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No. 90-233

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD EUGENE RYANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing a pretrial order suppressing evidence.

On January 19, 1989, a grand jury sitting in the Western District of Oklahoma indicted petitioner on one count of conspiring to restrain and suppress competition in the provision of moving services from Fort Sill, Oklahoma, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Prior to trial, petitioner moved to suppress two recordings of conversations between petitioner and a government informant. The conversations took place in June 1986, long before petitioner was indicted.

The district court granted petitioner's motion to suppress the recordings. The court found that at the time recordings were made the government knew petitioner to be represented by counsel. Therefore, the court held, by contacting petitioner through an informant without the consent of petitioner's counsel, the government violated Disciplinary Rule 7-104(A)(1) of the American Bar Association's Model Code of Professional Responsibility, which was incorporated by reference in the local rules of the district court. Pet. App. 28a-31a. The court also found that the government had failed to establish that petitioner had "waived any rights he possessed" by revealing information to the informant. *Id.* at 31a.

The government appealed, and the court of appeals reversed. Pet. App. 1a-21a. The court held that Disciplinary Rule 7-104(A)(1) does not apply to contacts with represented defendants during the investigative phase of a case. Because the contacts in this case took place before the initiation of criminal proceedings, the court held that there was no violation of the Disciplinary Rule. Pet. App. 18a. The court also found that the recordings were not protected by the attorney-client privilege, because petitioner had waived that privilege by willingly disclosing information to the informant. *Id.* at 20a n.13.

Petitioner contends that the Disciplinary Rule had attached at the time of the June 1986 recordings. He argues that he and the government had reached an adversarial posture by then, even though no criminal proceedings had been initiated against him and his Sixth Amendment rights had not yet attached. Pet. 14-15. Petitioner also contends that he did not waive his attorney-client privilege by disclosing information to the informant, because he believed, albeit in-

correctly, that the informant shared his plight and concerns. Pet. 20.

Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The decision of the court of appeals places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress the recordings and found that he had waived the attorney-client privilege. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the decision of the court of appeals would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1990

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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